BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is officially reported and is found in Vol. 112 Fed. (2d), page 288, and is also found in the Record filed herewith at pages 44 to 47 inclusive.

No opinion disposing of the petition to rehear was filed (R., 71).

The opinion of the District Court appears and may be found in the Record on pages 38 to 40 inclusive.

II.

JURISDICTION

The statutory provision invoked to sustain the jurisdiction of this Court is Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, Chapter 22, Section 1, 43 Statutes at Large 938; United States Code Annotated, Title 28, Section 347.

2. The date of the judgment of the Circuit Court of Appeals to be revised is May 6, 1940 (R., 43). Petition for rehearing was filed by leave of the Circuit Court of Appeals, on June 5, 1940 (R., 49), and judgment denying such Petition was rendered and filed on June 27, 1940 (R., 71).

III.

STATEMENT OF THE CASE

A statement of the essential and material facts has been set forth in the Petition, and the same is here adopted in the interest of brevity.

IV.

SPECIFICATIONS OR ASSIGNMENTS OF ERROR

1.

The Circuit Court of Appeals for the Sixth Circuit erred in overruling and reversing the judgment of the District Court, and in remanding the cause.

2.

The Circuit Court of Appeals for the Sixth Circuit erred in holding by its judgment and opinion:

a. That said Section 8148 of the Code of Tennessee had any application in this case.

b. That Section 8148 of the Code of Tennessee and other statutory provisions and decisions of the Supreme Court of Tennessee, and of the United States Supreme Court have application and should be considered in determining the question of respondent's rights as a nonresident administratrix to invoke Section 8671 of the said Code in order to obtain constructive service upon petitioner, the alleged nonresident tort feasor.

c. That Section 8671 of the Code was not enacted for the benefit of residents only and did embrace the respondent,

Mrs. Hunt, who admittedly was a nonresident of Tennessee and qualified as a nonresident administratrix.

d. That said Section 8671 of the Code, construed in connection with said Section 8148, converts Mrs. Hunt, an actual nonresident into a resident citizen of Tennessee, and that for the purposes of this suit respondent as administratrix must be treated as a resident citizen of Tennessee with the privilege of having her summons acted on by the Secretary of State just as if she had been an actual resident of the State.

e. That respondent as a nonresident administratrix was, under said Code Section 8148, entitled to the same methods and privileges as would have been accorded to the deceased himself or to a resident representative.

f. That said Sections 8671 and 8148 of the Code are not statutes which must be strictly construed, and in failing to strictly construe said statutes as against respondent.

g. In reading into said statute, contrary to the legislative intent, and contrary to the plain and unambiguous language of the statute, the words "or his administrator or executor."

h. That the recovery sought was in the right of the deceased himself and was not in respondent, the mother, as the sole beneficiary, and as the real and only party in interest.

3.

The Circuit Court of Appeals for the Sixth Circuit erred in its interpretation given to the Tennessee decisions in

Railroad v. *Maxwell*, 113 Tenn., 464, and of *Mann* v. *Smith*, 158 Tenn., 463, and *Memphis St. Ry.* v. *Moore*, 243 U. S., 299, and erred in holding that said decisions had application to Section 8148.

4.

The Circuit Court of Appeals for the Sixth Circuit not only erred in its interpretation and application of the above cases, but the effect of the interpretation of the statutes as given to it by the Circuit Court of Appeals for the Sixth Circuit in said decision would be to render Sections 8148 *et seq.*, and Sections 8671 *et seq.*, void and contrary to the Constitution of the United States, Sec. 2, of Art. IV, and the Fourteenth Amendment, for the reasons hereinafter pointed out.

5.

The Circuit Court of Appeals for the Sixth Circuit erred in denying the petition for rehearing.

ARGUMENT.

ASSIGNMENTS NOS. I AND II

In considering the first assignment, it is necessary to briefly summarize the opinion and judgment of the learned District Judge (R., 38-40). The District Judge held that Section 8148 did not apply at all to the question at bar. He pointed out that *any* administrator, regardless of Section 8148, can sue a citizen of Tennessee for an injury, provided personal service of process is obtained while within the jurisdiction; that respondent, Mrs. Hunt, therefore, although she should be a foreign administratrix, would have the right to bring this action, so that if respondent had obtained personal service upon petitioner, there would be no question of jurisdiction and process. The District Judge was of opinion, from a considered reading of the statute, that *it was enacted for the benefit of residents of Tennessee,* which it undoubtedly was. Therefore, the question was, admitting that Mrs. Hunt was a nonresident of the State at the time in question, was that sufficient to bring petitioner before the Court? In answering this question, the District Judge said that it was clear that if Mifflin (the deceased) had been injured but not killed, there could be no question under the terms of the statute but what he could have brought petitioner before the Court through service on the Secretary of State; this was not the situation. In the case at bar, the District Judge pointed out that Mifflin was dead,—that his mother, a nonresident citizen and sole beneficiary, was bringing this suit as a foreign administratrix. And the District Judge correctly reasoned that the statute was plainly enacted for the benefit of residents of Tennes-

see, and no where provided that its benefits should accrue to nonresidents or to a nonresident administratrix, or to any administrator at all; therefore he was of opinion that the suit could not be maintained, and he accordingly sustained the plea in abatement.

As stated, the Circuit Court of Appeals disregarded this reasoning of the District Judge and reversed the lower Court by what, we submit, is an erroneous construction of the statute. In order to reach this conclusion, the learned Circuit Court of Appeals applied other statutes and construed decisions as to them; the final result was that the statute was amended by the Court's own judicial legislation, in disregard of a universal rule of statute construction and in conflict with other decisions of the Circuit Courts of Appeal.

The decision and judgment of the learned Circuit Court of Appeals disregarded the following propositions:

I. This is a personal action, where the unusual remedy of constructive service of process was attempted under Statutes of Tennessee. Under the terms of the Statute, the remedy is expressly limited, and no administratrix, whether resident or nonresident, has any right to invoke the benefits of its provisions.

II. The defendant below, petitioner here, was and is a nonresident of Tennessee, upon whom no personal service was obtained. Constructive service was attempted through the Secretary of State of Tennessee under the terms of Code, Sections 8671, 8672, 8673, which *statute expressly limits its benefits to civil actions brought by residents of Tennessee.* But the action here was not brought by a *resident of Ten-*

nessee. It was brought by a nonresident who was a nonresident administratrix.

III. The above statute was enacted for the benefit of residents of Tennessee. Its language is plain and unambiguous. Its use may be invoked *only by a resident of Tennessee,* and only then in a civil action brought by *such* resident of Tennessee. Respondent admits on the record (Brief, p. 17) that her position is untenable *unless the Court reads into the statute the additional words "or his administrator or executor,"* and this cannot be done, for Courts cannot invade the province of the Legislature.

IV. Moreover this statute of Tennessee is in derogation of the common law. It must be strictly construed, and for this reason the Courts will not add to or enlarge it.

ASSIGNMENT NO. III

It is earnestly asserted that the statement of the grounds under this assignment clearly shows the error of the judgment of the learned Circuit Court of Appeals in reversing the District Judge. Petitioner has pointed out that the learned District Judge was correct in his conclusion and the reasons therefor, and that said Code Section 8148, had no application, and that Code Section 8671 was enacted for the benefit of residents only, and was clear and unambiguous in its terms, and did not embrace the respondent as administratrix. However petitioner most earnestly submits that a consideration of the opinion of the Circuit Court of Appeals shows that the conclusion reached in its judgment was based on an erroneous reasoning, as shown by the statement of the grounds for this assignment.

The Circuit Court of Appeals refused to consider Section 8671 except in relation to Section 8148. It then undertook to construe Section 8148 and based the reasoning of its opinion upon the decision of the Tennessee Supreme Court in *Railroad* v. *Maxwell,* 113 Tenn., 464 (Opinion C.C.A., R., 45). This decision was handed down in 1904, long before the Constructive Service Act (Section 8671) was passed by the Tennessee Legislature. And of course the decision does not purport to construe Section 8671, and the Supreme Court of Tennessee could not have contemplated that this decision would control this statute. This decision decided *only* one question with reference to Section 8148. The question is stated by the Supreme Court of Tennessee itself in said opinion as follows:

> "The question made upon this act in the present case is whether a nonresident administrator of the estate of a person dying in this State, or leaving assets or property in the State, and appointed by the courts of this State, can prosecute a suit in this State on the pauper oath."

The Supreme Court answered this question in the affirmative, and in its decision considered previous and comparative legislation on the subject, and held that in this special aspect the act seemed to be in entire harmony with the purposes of the legislation. The decision was limited to this single question.

Furthermore the Supreme Court of the United States, construing the *Maxwell* case, has held that this was the sole purpose of this act. In *Memphis St. Ry.* v. *Moore,* 243

U. S., 299, the Court, speaking through Mr. Justice Clark, said:

> "Upon a full review of the legislation of the State in *Southern R. Co.* v. *Maxwell*, 113 Tenn., 464, 82 S. W., 1137, the Supreme Court of Tennessee decided that the sole purpose of this Act is to extend to such nonresident executors and administrators as are described in it the privilege of suing in the State Courts in *forma pauperis* . . ."

The Supreme Court also said that the *effect* of it, when read with other statutes of the State on the subject, is to *confine* this *privilege* to the *people of the State, or to suits devoted to their interests.* And so, on the question of jurisdiction this decision of the Supreme Court held that a nonresident administrator could not be treated as a citizen of Tennessee on the question of diversity of citizenship for removal in that case.

Also in the same case of *Memphis St. Ry.* v. *Bobo,* 232 Fed., 709, the Circuit Court of Appeals for the Sixth Circuit, speaking through Judge Sessions, said:

> "*No attempt is made to convert an actual nonresident into a citizen of Tennessee,* or to provide for the revocation of letters of administration of a nonresident administrator in case he avails himself of his constitutional right to bring suit in the proper court of the United States." (Italics ours.)

We earnestly insist that it is impossible to reconcile the ruling of the Circuit Court of Appeals in the instant case with its own rulings in the *Memphis St. Ry.* case, *supra,* and with the ruling of the Supreme Court of the United States in that case.

The Legislature of Tennessee had the power to confer upon nonresident administrators as well as resident administrators the right to take the oath in *forma pauperis* if it so desired. In fact, as pointed out in *Railroad* v. *Maxwell, supra,* the Legislature in 1897 did pass an act providing that any personal representative of the estate of any deceased person in Tennessee might prosecute suits upon the pauper oath. Later the Act of 1901 was passed which provided that no person not a citizen or resident of Tennessee should be permitted to bring suits under the pauper oath, and this Act was sustained and enforced in *Southern Railway* v. *Thompson,* 109 Tenn., 343, and in *Fawcett* v. *Railway Co.,* 113 Tenn., 246, 81 S. W., 839, which held that the Act of 1901 applied to nonresident administrators, and prevented them from bringing suits upon the pauper oath.

Then in 1903, was passed the Act which has now (with immaterial variations) become Section 8148 of the Tennessee Code. All that that Act provided, and was intended to provide, and all that that Act has been construed to provide, was that it created an exception in the cases of nonresident administrators, so that they could take the pauper oath, provided the nonresident qualified as administrator of a person dying in, or leaving assets or property in, this State. As said by the Supreme Court of the United States, *supra,* this Act did not attempt to make the nonresident administrator a citizen of Tennessee so as to deprive the Federal Courts of jurisdiction on removal on the ground of diversity of citizenship; *in fact the case at bar was removed without objection on the ground that respondent was a nonresident.* And, as stated by Judge Sessions, *supra,* the act

made no attempt to convert an actual nonresident into a citizen of Tennessee. Yet the learned Circuit Court of Appeals in this case, we earnestly submit, has, by its judicial decision, converted Mrs. Hunt, the respondent, an actual nonresident, into a resident citizen of Tennessee.

We submit that the error becomes more apparent for other reasons argued herein.

It will be seen that both Sections 8148 and 8671 are constructive or substituted service statutes. Section 8148 provides for substituted service upon the foreign administrator through the County Court Clerk, and Section 8671 provides for substituted service through the Secretary of State. Both statutes are construed by the Circuit Court of Appeals in the instant case, and the construction given Code, Section 8148, is used as a basis for the Court's conclusion that this nonresident administratrix is to be treated as a resident citizen of Tennessee in connection with the Constructive Service Statute. It is most earnestly insisted, and with deference to the Circuit Court of Appeals, that the error here is manifest. The Court had before it a plain and unambiguous statute in so far as the issue was concerned. Why was it necessary for the Court to disregard its clear language and seek for a construction contrary thereto? Having committed this error the learned Court seeks a construction of another statute to aid it in construing the original statute. Then the Court joins these two statutes and construes one in the light of the other, holding that the respondent is embraced as a resident citizen in the original statute, contrary to its terms; and finally overlooks the fact that both statutes are Substituted Service Statutes, and

gives them a construction contrary to the absolutely settled rule of strict construction.

In fact, it has been expressly held by the Courts of Tennessee that both must be strictly construed in favor of the defendant. As to Section 8671, see *Producers' & Refiners' Corporation* v. *Illinois Central R. Co.,* 168 Tenn., 1. As to Section 8148, see *Pinkerton* v. *Fox,* 129 S. W. (2d), 514, *certiorari* denied by Supreme Court. The opinion of the Circuit Court of Appeals here cannot be reconciled with these decisions.

No mention is made in the opinion of the learned Court as to this insistence of strict construction made by petitioner, and in fact the Circuit Court of Appeals, as will be seen by a reading of its opinion, gave to said statutes the most liberal possible construction in favor of respondent—so liberal in fact, it seems to us, that it amounted to a very strained construction, and, as we submit, a construction which was erroneous and leads to an interpretation which would render these statutes unconstitutional.

The decision of the Circuit Court of Appeals in this case on this question is not only in conflict with the universal rule, but is in conflict with decisions of other United States Circuit Courts of Appeals, as follows:

In *Wood* v. *White,* 97 Fed. (2d), 646, there was a decision of the United States Court of Appeals for the District of Columbia (*certiorari* denied by Supreme Court in 304 U. S., 577, 578, 82 L. Ed., 1541). This decision construed a statute similar to Section 8671. This decision held that such a statute authorizing substituted service on nonresident

motorists does not apply to one who was a resident of the District of Columbia at the time of the automobile collision on public highways of the District, and who became nonresident thereafter, but prior to the time the action was instituted. It was contended that the purpose of the Act was to cover all situations arising out of traffic accidents within the District, involving both residents and nonresidents; and that, consequently, unless the Act is held to permit substituted service upon a person who is a resident at the time of the collision, but who becomes a nonresident thereafter, the purpose of the Act would be in part defeated.

The Court held that the statute imposes a contractual obligation in derogation of common law, and affects substantial rights; it cannot be extended, therefore, by implication to include persons who do not come within its terms, but instead must be strictly construed.

In *Hartley* v. *Utah Construction Co.*, 106 Fed (2d), 953, the Circuit Court of Appeals for the Ninth Circuit had before it a similar Act of Oregon. The Court affirmed the action of the District Court quashing the summons. At the time of the service of the summons in this case it appeared that the Oregon constructive service act, by its terms, applied only to nonresidents personally operating automobiles in Oregon. While the case was pending, the statute was amended so as to include a nonresident whose automobile was being operated in Oregon "on his or its behalf." The Court refused to hold that the amendment applied to the pending case. The Court held that the constructive service statute impaired vested rights and for this reason the statute could not be applied retrospectively.

There are other decisions which show the uniformity with which the rule of strict construction has been applied, and further emphasize the error of the judgment of the Circuit Court of Appeals in this case.

In the late case of *Morrow* v. *Asher*, 55 Fed. (2d), 365, District Judge Atwell refused to read into the statute the word "owner," and held that a statute of this character—plain, unambiguous, and explicit in its terms, seeking to subject a person to new liabilities—should be strictly construed.

In *Riggs* v. *Schneider's Executor*, 279 Ky., 361, 130 S. W. (2d), 816, the Court of Appeals of Kentucky (June 23, 1939), held that a similar statute neither in express words nor by implication included a nonresident's personal representative nor authorized the revivor against them, stating:

> "We are not authorized to extend the terms of the statute beyond the plain import of the language contained therein."

To the same effect is *Ledin* v. *Davidson*, 216 Wis., 96 A.L.R., 589, where the Court said it found nothing in the Act providing for substituted service to suggest that the Legislature intended to provide for service of process upon the foreign personal representative.

In *Charles* v. *Fischer Baking Co.*, 187 Atlantic, 175, (N. J. Ct. of Errors and Appeals), the Court construing a similar statute said:

> "The statute may not be twisted to do that which appellant wishes to have done. The attempted service was without authority."

To the same effect are *Young* v. *Potter Title & Trust Co.*, 178 Atlantic, 177, (Supreme Court of New Jersey), and *Dowling* v. *Winters*, 181 S. E., 751, (Supreme Court of North Carolina).

See also Section 5914 of Blashfield's Cyclopedia of Automobile Law and Practice, and 25 R.C.L., s., 282, pp. 1057, 1058.

It has not, and never has, been contended in this case by respondent that the statute is ambiguous or obscure. She concedes that unless the words *"or his executor or administrator"* are inserted in the statute, her contention fails. The Circuit Court of Appeals upheld this contention.

We respectfully submit that this is contrary to all the fundamental rules of statutory construction.

> "When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction; the statute must be given its plain and obvious meaning."
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> 25 R.C.L., p. 962, Sec. 217; *U. S.* v. *Plowman*, 216 U. S., 372; *U. S.* v. *Detroit First Nat. Bank*, 234 U. S., 245.

The intention of the Legislature must primarily be determined from the language employed, and ordinarily the Courts have no right to insert words and phrases so as to incorporate in the statute new and distinct provisions.

Folsom v. *U. S.*, 160 U. S., 121, 40 L. Ed., 363.

It is not for the Court to say, where the language of the statute is clear, that it shall be so construed as to embrace

cases because no good reason can be assigned why they were excluded from its provisions.

Bate Refrigeration Co. v. *Sulzberger,* 157 U. S., 1, 39 L. Ed., 601.

It is, therefore, respectfully submitted that the decision of the learned Circuit Court of Appeals in this case was based upon an erroneous construction of the statutes in question, as well as decisions cited in the learned Court's opinion, and is in conflict with the decisions of the Supreme Court of the United States and the decisions of other Circuit Courts of Appeals, and is erroneous.

In applying the erroneous construction of the *Maxwell* case and the *Memphis St. Ry.* case, *supra,* the learned Circuit Court of Appeals held that respondent's suit was a cause of action devoted to the interest of the deceased, and that a recovery "would be in the right of the deceased himself." Petitioner very earnestly insists that this reasoning is not correct, that this cause of action is the right of the nonresident citizen respondent, and in her interest, "for her use and benefit," as she alleges. We submit that on this point the Circuit Court of Appeals has misconceived the nature and character of the cause of action, and the relation of petitioner to it.

What is the nature of the cause of action in this case? The declaration filed by respondent, in both counts, states that it is for damages "for the wrongful and unlawful death of her said intestate, the said Robert Morris Mifflin." It states that he left surviving him his mother, Mrs. Bessie Mifflin Hunt (the same person who is the foreign administratrix),

"for whose use and benefit this suit is brought." (Italics ours.) (R., 5-7.)

It will be noticed, therefore, that the respondent herself, in stating the cause of action, charges that it *was for her benefit, and for her use,* and since she was the sole beneficiary of course it *was for her sole benefit and for her sole use.*

This cause of action which respondent as foreign administratrix is thus enforcing for her sole use and benefit, depends entirely upon Code, Section 8236, hereinafter quoted. The Supreme Court of Tennessee, in *Railway Co.* v. *Lilly,* 90 Tenn., 564, has construed this cause of action directly contrary to the construction expressed by the Circuit Court of Appeals as the reason for its decision. In that case, the Supreme Court of Tennessee held that this statute (8236, now) virtually *creates a liability in favor of the widow and next of kin,* which did not exist at common law; that no right of action under it will be inferred, and no remedy given in favor of any persons, except those distinctly contemplated as beneficiaries. The Supreme Court of Tennessee in this case also said that the object of the Act was to confer a benefit upon the widow, children, and next of kin of the deceased—to give them a right of action which otherwise they would not have had, and that the provision is not in favor of the estate proper of the deceased person.

And where the sole beneficiary is the father or mother, as in this case the mother, the Supreme Court of Tennessee has held that such a person is the *real party in interest.* In

Whitson, Admr. v. *Tenn. Central Railway, supra,* our Supreme Court said:

> "While such beneficiary is not technically a party of the suit, that he is the real party in interest is judicially recognized. Thus, in a suit by the administrator of a deceased child for damages for wrongful death, the contributing negligence of the father, as sole beneficiary of the recovery, will defeat the suit. 'Upon principle, we think that, no matter how the suit is brought, whether as administrator or as father, it can be defeated by the father's contributory negligence, when he is sole beneficiary.' *Bamberger* v. *Citizens' Street Railway Co., supra.*
>
> "And a settlement of the cause of action, by payments to the widow, under the workmen's compensation law, will defeat a pending action of the administrator. *McCreary* v. *N. C. & St. L. Ry.,* 161 Tenn., 691, 34 S.W. (2d), 210."

It is said by the Circuit Court of Appeals (R., 47), that if the deceased had survived and brought suit, or if upon his death a resident administratrix had been appointed, process accepted by the Secretary of State would have been valid. We have shown that in the latter contingency process *could not* be valid, for the act does not include a suit by any administrator, foreign or domestic. But we respectfully submit that both said contingencies beg the question; the deceased did not survive, a resident administratrix was not appointed, and *this action is brought for the use and benefit of his mother,* in whose favor, a liability is created which did not exist at common law. If there had been no widow, child, or next of kin, there would have been no cause of action *(Railway Co.* v. *Lilly, supra).*

When the Supreme Court of Tennessee in the *Maxwell case, supra,* used the expression that this privilege was given "to the people of this State, or to suits devoted to their interests," it was speaking of, and had reference to, the Act of 1901, and not Section 8148. Bearing in mind that *Railroad* v. *Maxwell, supra,* dealt solely with the question as to whether a foreign administrator, under the Act of 1903 (later Section 8148), could take the pauper oath, and that the Supreme Court was reviewing other Acts of the Legislature, it is pertinent to note that the Supreme Court in the above case said:

> "Indeed, the act, on the point in question, seems to be in entire harmony with the purpose of the legislature, as evidenced by the act of 1901, to confine the privilege of suing under the oath to the people of this State, or to suits devoted to their interests."

How can it be said that this expression of the Supreme Court of Tennessee can now be used as the sole basis for depriving a nonresident citizen of her constitutional right to be served personally with process? How can it be said that this dictum can be used to destroy the universal rule of strict construction? In other words, can it be said that this expression of the Supreme Court of Tennessee, itself *obiter dictum,* used with reference to the Act of 1901, can give vital force to the Foreign Administration Statute which itself is a substituted process statute, and, therefore, in derogation of the common law, and then how can it be said that these words can be further used to give validity to another Constructive Service Statute, that is, Section 8671, so that the petitioner can be deprived of her constitutional right?

We respectfully submit that the reasoning of the Circuit Court of Appeals in this regard was clearly erroneous, and that the whole basis of the decision in this aspect depended upon this reasoning, and that this Court should correct same by *certiorari*.

In the second place, the opinion of the Circuit Court of Appeals on this point is based upon decisions which construed an old statute of Tennessee and not the statutes in question.

The decisions quoted by the Circuit Court of Appeals in support of its construction are *Whaley* v. *Catlett*, 103 Tenn., 347, 355, and *Davidson-Benedict Co.* v. *Severson*, 109 Tenn., 572. These decisions are decisions which construe the old statute of Tennessee before it was brought into Code of Tennessee for 1932, which latter statute of course is the applicable law. The old statute as appearing in Shannon's Code of Tennessee read as follows:

> "4025. Right of action for wrongful injuries resulting in death or for wrongful killing does not abate, but passes to whom.—The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from claims of creditors."

The new statute which the Court had reference to in its opinion reads as follows:

"8236. Right of action for wrongful injuries resulting in death for wrongful killing does not abate, but passes to whom.—The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow; and, in case there is no widow, to his children or to his next of kin; or to his personal representative, for the benefit of his widow or next of kin, in either case free from the claims of creditors."

It will be noted that under both statutes it was provided that the right of action of a person who dies from injuries received from another, etc., would have had in case death had not ensued, should not abate or be extinguished by his death. However in the *old* statute (Sections 4025 of Shannon's Code) it was provided that this right of action "shall pass to his widow, and in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors."

In the *new* statute (Code of Tennessee of 1932, Section 8236), it is provided that the right of action "shall pass to his widow; and in case there is no widow, to his children or to his next of kin; or to his personal representative for the benefit of his widow, or next of kin, in either case free from the claims of creditors."

We believe the difference between the two statutes in application to the question in this case, is readily seen. Under the old statute, the mother who is the *sole beneficiary in this case* had no right of action in her own right, but the

action had to be brought by the personal representative. This was expressly held in *Whitson, Admr.* v. *Tennessee Central Ry.*, 163 Tenn., 35, wherein this old statute is so construed.

But under the new statute, the mother was expressly given this right of action, and could have brought suit in her own name. Indeed it is fairly to be assumed that the Code of Tennessee was amended so as to give this remedy, which was pointed out to be lacking in the *Whitson* case.

Bearing in mind the language of the present Code (Section 8236) as contrasted with the old Code (Section 4025), it will be seen that under the present Code, which is controlling, the plaintiff, Mrs. Hunt, was the only next of kin and as the sole beneficiary had the primary right to sue in her own name for the recovery in this case. *The attention of this Court is earnestly called to the fact that if Mrs. Hunt had brought such suit individually, in accordance with the primary right conferred by the statute, it would have to be admitted that she could not have obtained valid service under the Constructive Service Act,* for admittedly she was a nonresident of the State of Tennessee, and actually a resident and citizen of the State of Florida, as the opinion itself states on page one thereof.

As heretofore stated, the *Whaley case, supra,* and the *Davidson-Benedict case, supra,* cited in the opinion of the Circuit Court of Appeals, were cases which construed the old statute. We venture to suggest, with all deference, that the difference in the statutes is material. And since the reasoning of the opinion is based upon the argument that if the deceased had survived and brought the suit, or if

upon his death a suit had been brought by a resident administrator, in either case process under the Constructive Service Act would have been valid, we insist that the Circuit Court of Appeals must have been in error. Certainly we do not believe that it is sound policy to permit the respondent in this case, realizing that she could not get service in her individual right, to go over to the Davidson County Court and have herself appointed Administratrix, so that she could invoke the Constructive Service Act under the fiction that she had been changed or "converted" from a nonresident by being appointed a foreign Administratrix. We do not believe that it was the intention of the Legislature of Tennessee to create such a situation, and we do not believe that Courts would adopt such a fiction which gives rise to such a mischievous and unwholesome result. This, it seems to us, is an argument that comes with greater force when the Courts are dealing with the right of a nonresident under the Constructive Service Act, which Act has been repeatedly held to be in derogation of the common law, to be jurisdictional, and to affect substantive rights.

It is respectfully submitted that this assignment should be sustained for the reasons stated.

ASSIGNMENT NO. IV

This assignment raises a constitutional question which necessarily arises for the first time as the result of the opinion of the Circuit Court of Appeals.

In the District Court, no constitutional question was anticipated by either of the parties, nor was the case tried under the apprehension of the subsequent interpretation now given by the Circuit Court of Appeals as to the statute

and decisions. In the District Court, respondent first tried the case on the issue that she was in fact a resident of Tennessee. She testified under oath to this effect. Proof was introduced by petitioner, and the District Judge found as a fact that she was a nonresident of Tennessee at the time the cause of action arose, and at the time the suit was brought (R., 40). Thereupon respondent contended that Code, Section 8671, should be amended, by judicial legislation, so as to include her as administratrix. (Respondent's brief, C.C.A., p., 17.) The District Judge declined to do this. He held that the Act was for the benefit of residents only, and that as respondent had been held to be a nonresident, she could not invoke the benefits of Code, Section 8671, and the District Judge ordered the summons quashed, sustaining the plea in abatement. He held also that Code, Section 8148, had no application.

The Circuit Court of Appeals, in its opinion, has construed both statutes, and we respectfully and earnestly insist that its interpretation and application render both statutes unconstitutional, that is to say, in violation of Section 2, of Article IV, of the Constitution of the United States, and the Fourteenth Amendment thereto.

Petitioner is well within her rights in raising this constitutional question at this time. The constitutional question results from the interpretation and application given these statutes by the decision of the Circuit Court of Appeals in this case.

> "Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment *often depends on how the statute is construed and applied. It may be valid when given a particular appli-*

cation and invalid when given another." (Italics ours.) *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S., 535, 547; 78 L. Ed., 1411, 1418.

And in this case petitioner is vitally interested in the effect to be given both statutes, for if both statutes are invalid and unconstitutional, petitioner must be personally served by process before suit against her could be maintained.

It has been held, however, that the constitutional question may be raised by persons not interested in the case before the Court, if they are interested in the effect to be given the statute.

> "As a general rule only those who are parties to a suit may raise the question of constitutionality involved in its decision, but since a decree pronounced by a court without juridiction is void, the validity of the statute may be considered on its being brought to the attention of the court by persons interested in the effect to be given the statute, although not interested in the case before the court, where the jurisdiction of the court depends on such validity."

16 *Corpus Juris Secundum*, Sec. 83, p. 176, and cases cited.

The Statutes Are Unconstitutional

We call the Court's attention to the following language in Code, Section 8671:

> "nonresident of the state . . . shall be deemed thereby to constitute the secretary of state his agent for the acceptance of service in any civil action *brought by a resident of this state against him* arising out of any

accident or injury occurring in this state in which such vehicle is involved." (Italics ours.)

We call the Courts' attention to the following language from Code, Section 8148:

> "and, in case it is desired *by any citizen or resident of this State to sue said administrator or executor in his official capacity for any debt or demand, due or owing to any citizen or resident of this State, from his testator or intestate,* then in case of the inability of the officer in whose hands process is placed to find said administrator or executor in this State, notice of said suit" shall be served upon the Clerk of the County Court, etc. (Italics ours.)

In regard to Section 8671:

It will be seen from the above language of the Code, that Section 8671, *limits* the right to this special kind of service, *to civil actions brought by residents of Tennessee only.* In withholding the right of constructive service from residents of any other state, there is an infringement of the constitutional guarantee of a privilege and immunity to which nonresidents are entitled, and nonresidents are denied due process, in that a nonresident is prohibited from the right to obtain constructive service of process, whereas a resident is given this right.

This question has never been decided by the Supreme Court of the United States, nor by the Supreme Court of Tennessee.

In *Hess* v. *Pawloski,* 274 U. S., 352, 71 L. Ed., 1091, the Supreme Court of the United States held the Massachusetts

statute constitutional, but this statute, unlike the Tennessee statute, *did not* restrict its operation to suits brought by residents of Massachusetts.

In *Wuchter* v. *Pizzutti*, 276 U. S., 13, 72 L. Ed., 446, the Supreme Court set aside the original New Jersey statute because it did not furnish sufficient notice to the nonresident defendant.

The provisions of Section 2, Article IV, of the United States Constitution, constitute safeguards to the citizen of one state of the right to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise. (*Blake* v. *McClung*, 172 U. S., 239, 43 L. Ed., 432.)

And, as was said in *United States* v. *Wheeler*, 254 U. S., 281, 293, 65 L. Ed., 270, 273:

> "(a) In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the states to forbid and punish violations of this fundamental right. *Corfield* v. *Coryell*, 4 Wash. C. C., 371, 380, 381, Fed. Cas. No. 3, 230; *Slaughter-House Cases*, 16 Wall., 36, 76, 21 L. Ed., 394, 408."

The Tennessee statute *deprives a nonresident plaintiff of its benefits, while giving the full force of its benefits to a resident plaintiff, and at the same time imposes the penalty of substituted process upon a nonresident defendant.* This

is a violation of the above provisions of the Constitution of the United States.

The statute, among other things, clearly deprives this petitioner of the right of access to the Courts of Tennessee, to bring actions therein, and to seek her remedies, while giving this same privilege to residents, and (according to the decision of the Circuit Court of Appeals), while giving this exclusive privilege to a nonresident foreign administrator. This is plainly in violation of Section 2 of Article IV of the Constitution.

> "The intention of section 2 of Article IV was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."
>
> *Cole* v. *Cunningham,* 133 U. S., 107, 33 L. Ed., 538, 542.

The right of citizens of other States to bring suit in any Court of the State where a citizen of that State may, is guaranteed and protected by the above section of the Constitution of the United States, and the Court has no discretion to refuse to hear a case between nonresidents over which it has jurisdiction, merely because the suit is brought there for the convenience of parties and attorneys and will entail expense upon that account.

Mason v. *Boone Co.,* 16 Fed Cas. No. 9232, p. 1012 (C. C., W. D. Penn.);

Boureston v. *Boureston,* 285 N. W., 426 (Sup. Ct., Wis.);

Sheehan v. *Lewis,* 260 N. W., 633 (Sup. Ct., Wis.);

Cofred, et al. v. *Gartner,* 7 L. R. A., 512 (Sup. Ct., Mich.);

Herrman v. *Franklin Ice Cream Co.,* 208 N. W., 141 (Sup. Ct., Neb.);

Erving v. *Chicago & N. W. Ry. Co.,* 214 N. W., 12 (Sup. Ct., Minn.).

In all of the cases in the United States Courts which have discussed this question, there will be found no pronouncement that the constitutional requirement is satisfied by the provisions of the above statute, under the construction as given it by the Circuit Court of Appeals. The limit to which any decision has gone is that the State Court has power to place terms upon nonresidents which in themselves are reasonable and adequate for the enforcement of any rights they may have, but there will be found no case upholding the constitutionality of any act where this right has been *denied* a nonresident, as in the case at bar. The limit of the doctrine is stated by the United States Circuit Court of Appeals for the District of Columbia, in *Duehay* v. *Acacia Mut. Life Ins. Co.,* 105 Fed. (2d), 768, 776:

> "The constitutional requirement is satisfied, in a case like the present, if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."

In regard to Section 8148:

We have pointed out that this statute in its first section provides that a nonresident who qualifies under it as executor or administrator shall be deemed to have

assented to be treated as a resident citizen for the purpose of suing or being sued; but expressly then limits this right to a suit for any debt or demand desired to be brought by a *citizen or resident of Tennessee.* The Circuit Court of Appeals insisted on applying this statute to its decision in the instant case, and without its application, according to the Circuit Court of Appeals, the respondent would not have a right to obtain substituted process. It will be seen that Section 8148 is subject to the same constitutional objection as Section 8671, *supra.* No nonresident of the State of Tennessee could sue respondent in this case, and petitioner, Mrs. Noll, being a nonresident is, therefore, prohibited from access to the Courts in suing respondent. It results that there is a plain discrimination as between the petitioner, a nonresident, and between respondent who has been declared by the opinion of the Circuit Court of Appeals to be in the status of a resident. *The door to the Courts of Tennessee has been shut upon petitioner, but the door has been opened for the benefit of respondent, notwithstanding the fact that Mrs. Hunt is a nonresident of the State of Tennessee, and this suit is brought for her use and benefit, and she is the sole beneficiary of the action, and notwithstanding the fact that Mrs. Hunt, without this construction and application of the statute, could not have brought any suit without personal service upon petitioner, since Mrs. Hunt admittedly is a nonresident of Tennessee and a citizen of the State of Florida.*

According to the opinion of the Circuit Court of Appeals for the Sixth Circuit, petitioner, Mrs. Noll, under both the said statutes is denied her constitutional right to be personally served with process wherever she may be found.

Petitioner's constitutional rights should not, and cannot, by the Legislature of Tennessee be so denied her. She is now a citizen and resident of the State of Illinois; she was a citizen and resident of the State of Illinois at the time this action was brought against her, and at the date of the accident, and at the time Mrs. Hunt qualified as nonresident administratrix in the County Court of Davidson County for the sole purpose of bringing this suit for her own use and benefit against petitioner, as her declaration alleges. Admittedly, and unquestionably, respondent, Mrs. Hunt, could not invoke the benefits of the constructive service of process statutes above referred to unless she had qualified as a nonresident foreign administratrix in the County Court of Davidson County, Tennessee.

As for petitioner, Mrs. Noll, she cannot invoke the constructive service feature of Section 8148, and bring suit against respondent, Mrs. Hunt, for the injuries which she sustained and the damages to her property as a result of a head-on collision on the highways of Tennessee, for this statute limits the right to sue the foreign administrator *for any debt or demand due or owing any citizen of resident of the State of Tennessee.* Likewise, as stated, Section 8671 limits the right to obtain constructive service of process to any civil action brought by a *resident* of the State of Tennessee. Therefore, under the construction and application, given by the Circuit Court of Appeals for the Sixth Circuit, this petitioner, Mrs. Noll, would have been compelled to have obtained personal service of process on Mrs. Hunt in the State of Florida where she resided; in any event, she was positively prohibited under the terms of the statute from proceeding against Mrs. Hunt in the State of Tennes-

see, unless she had obtained actual service of process on her while she was in the State of Tennessee. However, it is doubtful whether this right, under the language of the statuse, even if personal service had been obtained against her as administratrix, would have been granted her by the courts of Tennessee.

Mrs. Noll did not assent to be treated as a resident citizen of this State. Under the language of the Act, the intent is presumed and forced upon her. The argument of respondent is that by merely entering the confines of Tennessee, or by so using its highways, this assent was presumed. She had a right both to enter the State and to use the highways of the State. She had a right to invoke the aid of the courts of the State of Tennessee, all of which were guaranteed to her by the Constitution of the United States. And these rights could not be burdened or qualified in any way except upon the same substantial terms and in the same manner and extent as a citizen of Tennessee was burdened with. The Act as construed by the Circuit Court of Appeals must result in the conclusion that the Legislature of Tennessee assumed that her right was nothing more than a fiction of which she could be absolutely deprived if the Legislature so decided. This is an erroneous conception of the law, and is directly in conflict with Article IV, Sec. 2, of the Constitution of the United States, and of the Fourteenth Amendment. Petitioner's rights were fundamental. The State of Tennessee did not extend any privilege to petitioner, because petitioner already had the right to use the highways of Tennessee, and to avail herself of the privileges of the courts of Tennes-

see, since these are rights guaranteed to her as a citizen of the United States.

> "The 'privileges and immunities' referred to in Const. Ind. art. 1, s. 23, prohibiting any law granting privileges or immunities to one class of persons which upon the same terms are not open to all citizens, and Const. U. S. Amend. 14, s. 1, prohibiting the abridgment of the privileges and immunities of citizens of the United States, are general abstract *personal* rights, in their nature *fundamental and pertain to all citizens in free governments,* and which they are entitled to enjoy throughout the several states as well as in the state of residence, such as freedom of travel, pursuit of any lawful vocation or of pleasure, enjoyment of life and liberty, acquisition of property, the right to control it in security and peace, and the right to resort to the courts for its protection without restriction other than those usually affecting all persons. *Strange* v. *Board of Com'rs of Grant County,* 91 N. E., 242, 173 Ind., 640; Id., 91 N. E., 506." (Italics ours.)
>
> *Words and Phrases* (2nd Series), Vol. 3, p. 1215.

Also:

> "Attempt will not be made to define the words, 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt these words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempted from

any higher taxes or excises than are imposed by the state upon its own citizens."

Elias Ward v. *The State of Pennsylvania,* 12 Wall., 418.

See also: *Williams* v. *Fears,* 179 U. S., 270.

Under the construction and application of these statutes by the decision of the Circuit Court of Appeals for the Sixth Circuit, it will be seen that if a collision occur on a Tennessee highway, between two cars, one driven by a nonresident and the other driven by a resident, with a nonresident owner, the nonresident owner is deprived of the substituted service while the resident has the benefit of it, and the nonresident who was driving the other car must submit to substituted process; or if a nonresident runs into and injures two men on a Tennessee highway, one of whom lives in Kentucky and the other in Tennessee, the Tennessee pedestrian can invoke this statute, while the Kentucky pedestrian cannot.

This unconstitutional discrimination is further shown by the fact, heretofore pointed out, that respondent, by the Circuit Court of Appeals decision, is "converted" from a nonresident to a resident by the simple act of taking out nonresident administration letters in the Davidson County Court of Tennessee, and thereby invested with the right of substituted process which is denied petitioner. And further that notwithstanding the situation that respondent stands before the Federal Court in this case as a nonresident citizen plaintiff (*Memphis St. Ry.* v. *Moore,* 243 U. S., 299, *supra*), and the case was removed therein on the specific ground of her diversity of citizenship,

respondent has been declared to be a resident by the learned Circuit Court of Appeals, and entitled to all the benefits of a resident citizen under these constructive service statutes, and against the rights of another nonresident.

We submit that the construction and application of these statutes by the Circuit Court of Appeals plainly show their unconstitutionality and that this petition for *certiorari* should be granted for this reason.

ASSIGNMENT NO. V.

It follows that if petitioner is correct in what has been said hereinabove, the Circuit Court of Appeals was in error in denying her petition to rehear, and this assignment should be sustained.

CONCLUSION.

It is, therefore, respectfully insisted that this case is one calling for the exercise by this Court of its supervisory and appellate powers, in order that the errors herein complained of and pointed out may be corrected, for the reasons herein stated; wherefore, the writ here prayed for, should issue, and upon final hearing that the judgment of the Sixth Circuit Court of Appeals should be reversed with proper directions so that justice may prevail.

Respectfully submitted,

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